No. 14688

United States
COURT OF APPEALS
for the Ninth Circuit

NELSON EQUIPMENT COMPANY, a corporation,

Appellant,

vs.

UNITED STATES RUBBER COMPANY, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon.

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ARGUMENT

Appellee claims that appellant had no right to rescind the contract of purchase because the Underwriters Laboratories, Inc. inspected and labeled the hose prior to shipment from appellee's factory, and because appellant failed to notify appellee of defects in the hose within a reasonable time, and further claims that appellee never consented to a rescission.

Appellee on pages 1 and 2 of its brief cites a number of cases holding that, where a buyer designates a third person to inspect the goods and determines whether or not the goods are of the quality specified in the contract, the buyer is bound by such inspection. This general rule does not apply if the inspection is fraudulent or if the defect in the goods is latent and would not be revealed by such inspection. Appellee, however, overlooks the fact that an inspection in order to be binding must be made when the goods are applied to the contract of sale; in other words, when title passes from the seller to the purchaser. No court has ever held that a buyer is bound to accept merchandise, regardless of its condition *when title is tendered, simply because it was in first class condition* at some time in the past. The cases cited by appellee are cases where the inspection was made at the time of constructive delivery to the purchaser. *Federal Grain Co. v. Hayes Grain & Commission Co.,* 255 S. W. 307, and *Citizens Independent Mill & Elevator Co. v. Perkins,* 152 Pac. 443, involved the sale of grain and *Field v. Descalzi,* 120 Atl. 113, involved the sale of tomatoes, in which grades were specified which were determined by public inspectors when the commodity was delivered to the carriers which is constructive delivery to the purchaser. In *Pacific Commercial Co. v. Greer,* 19 P. 2d 543, a Manila buyer purchased wire rope in San Francisco, and designated one in San Francisco to make the inspection. The contract called for delivery f.o.b. San Francisco. In *Amos v. Walter N. Kelly Co.,* 215 N. W. 397, green lumber was purchased to be shipped in installments. The opinion shows that title passed at the

time of inspection as the purchaser assumed control over it and had it dry kilned at his own expense. In *Gorham v. Dallas C. & S. W. Ry. Co.*, 106 S. W. 930, the commodity was sold f.o.b. In *Herman H. Hettler Lumber Co. v. Olds*, 221 Fed. 612, the court held that delivery was made and title passed at the point of origin.

In this case the contract called for delivery to the fire department at Seattle, Washington. The Underwriters' label was attached at appellee's factory in New Jersey. It is obvious that the purchaser was not bound to accept the hose until it was suitable for the purpose for which purchased when title was tendered.

If we assume that the Underwriters Laboratories, Inc. was acting as the agent of appellant when the inspection was made at appellee's factory, the appellant would not be bound by such inspection unless the defects were such that would have been revealed by such inspection. There were no apparent defects when the hose was received but the fabric in the outer jackets began to break under ordinary handling even before the hose was placed in use. The only objection to the hose was defects in the fabric of the outer jackets which began to appear after receipt of the hose and gradually developed until when the hose was returned all but 13 of the 96 sections were defective. The appellant does not know why the jackets failed. Inspection was made by a representative of the Underwriters Laboratories at Seattle (Tr. 13) and the cause was not determined. Unless the defects are of such a nature as should have been

revealed by the usual inspection a purchaser is not bound by an inspection, either by himself or his agent.

These defects appeared in but this one lot of hose and did not appear in the other lot purchased from appellee (Tr. 19). It is significant that, when this hose was returned to appellee's factory, after appellee had been informed that the fabric of the outer jackets was failing, and was there inspected and a representative of the Underwriters was called in for inspection, no tests were made of the fabric of the outer jackets (Tr. 21). Appellee at its factory had all the facilities for testing hose. If the fabric of the outer jackets was up to standard, it could have been determined, but appellee failed to test the only part of the hose about which the complaint was made but asks the court to conclude that the damage was the result of rough handling by the fire department. It is exteremely unlikely that a fire department would select but one lot of hose for rough handling.

Appellee says that appellant failed to notify appellee of the defects in the hose within a reasonable time. The record shows that the first 37 sections were rejected and returned to appellant on May 27, 1952 (Tr. 13), and that appellant notified appellee on May 28, 1952 (Tr. 16). This certainly is not an unreasonable delay.

Complaint is also made that part of the hose remained in the hands of the fire department after the first sections were found defective. There is nothing in the record to show that the fire department knew that the fabric in the outer jackets of other sections was failing until an attempt was made to find out what was wrong

with the 37 sections in September, 1952, when it was decided to inspect the entire lot (Tr. 13). It must be remembered that appellant was the authorized distributor of appellee's hose and was doing everything possible to keep the contract alive; that the City of Seattle did not cancel the purchase contract but simply demanded that the defective hose be replaced; that the fire department retained the hose at appellant's request while appellant was trying to get an answer from appellee (Tr. 16, 17, 19).

Appellee next claims that it did not consent to a rescission of the contract. It relies on the rule that a buyer in rescinding a contract of purchase must act promptly and that if he retains the goods for an unreasonable time without intimating to the seller that he has rejected them, he is bound by the contract. But appellee claims that a different rule applies when a buyer returns the goods to the seller with notice of intention to rescind the purchase and that a receipt and retention of the goods by the seller, without an affirmance or disaffirmance of the rescission does not amount to a consent to the rescission. Appellee cites *Jackson v. Miles F. Bixler Co.*, 127 So. 270, and *J. B. Colt Co. v. Hayenga*, 217 N. W. 187, which it claims supports this novel rule. In the first case merchandise was purchased and paid for and after the purchaser had displayed the goods for some time, he returned them to the seller, without notice and without any claim of right of rescission. The court held that under the circumstances the seller had no more duty to the purchaser than would a stranger to whom the merchandise was sent. In the second case

merchandise was bought on credit and returned to the seller who exercised no dominion over the merchandise other than place it in storage. Prior to its return the seller had refused to rescind the sale contract and after the return an agent of the seller had called upon the buyer to collect the balance of the purchase price. The court held that in the light of all circumstances it could not be inferred that the seller had consented to a rescission but stated that it would have been safer for the seller to have specifically notified the buyer that the merchandise was held for his account.

Appellee, however, argues that appellant was notified that the hose was being held as appellant's property. On page 16 of appellee's brief reference is made to a letter of May 1, 1953, and appellee says:-

> "Following its receipt of the May 1 letter, appellant was fully aware that appellee would not return purchase price and that the hose was held as appellant's property."

No letter of May 1, appears in the record and the record affirmatively shows that appellant was not notified that the hose was held as its property. Mr. Hellegers, appellee's claims manager, stated that he held the hose until August, 1953, and then placed in appellee's warehouse as customer's property but that he did not notify appellant (Tr. 21). Appellant's president, Mr. Corbett, says that he never knew what happened to the hose until he learned from Mr. Helleger's testimony on the trial of the case (Tr. 18). Mr. Hellegers also stated that the hose was not held for any purpose of appellant but was held awaiting instructions of appellee's sales department.

Appellee received a return of the hose with full knowledge that it was being returned under a claim of right of rescission of the sale contract. It took possession of the hose and exercised dominion over it for a purpose of its own. It never offered to return it to appellant or notify appellant of its disposition or deny appellant's right to rescind the conrtact until litigation became eminent.

Respectfully submitted,

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